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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SHERRY R. HUBER, Plaintiff, vs. IDA-WEST ENERGY COMPANY, and IDAHO POWER COMPANY, Defendants.	Case No. CIV 03-527-S-BLW **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL**

The Plaintiff submits this Memorandum In Support of Motion to Compel. This Memorandum will focus on two specific responses to requests for production which Plaintiff requires for a full understanding of the disputed facts involved in this litigation. This Memorandum is supported by the Affidavit of John C. Lynn ("Lynn Affidavit") filed herewith.

BACKGROUND

In 1990, the Plaintiff began her work with Defendant Ida-West Energy Company ("IWE") which is a wholly owned subsidiary of IdaCorp, a holding company. Plaintiff was hired to serve as Manager of Hydro Operations for IWE and Vice President of Ida-West Operating Services and

reported to Randy Hill, President of IWE. Hill, in turn reported to various officials at Idaho Power Company("IPC"), another wholly owned subsidiary of IdaCorp.

Plaintiff performed well during her tenure with IWE, receiving excellent reviews and regular raises until August of 1998 when she and her husband, Henry Huber, an officer of IWE, reported a complaint against Mr. Hill to the upper management of IPC. The complaint involved emails of a sexually explicit nature sent by Hill to the homes of Mr. Cine and Mr. Elliott, other employees of IWE. From that point forward, Plaintiff alleges that Hill engaged in a campaign to retaliate against her over her complaint to the upper IPC management and Mr. Hill's peers. As alleged, (see Complaint, paras.13-19), Hill shunned and ostracized Plaintiff and ultimately seized upon minor complaints of Plaintiff's subordinates concerning her management style to justify and fabricate claims that Plaintiff was deficient in her performance. As a result, Plaintiff complained of retaliation to the President of IPC in January of 2000 and filed a formal Charge of Discrimination with the Idaho Human Rights Commission ("IHRC") and the Equal Employment Opportunity Commission ("EEOC") the following month. In May of 2000, Hill again retaliated with the issuance of a Special Performance Review threatening termination.

In June of 2000, Plaintiff was diagnosed with breast cancer, was approved for short-term disability and then long-term disability. Despite Plaintiff's request to be returned to work on a part-time basis, she was terminated by Hill in October of 2000 pursuant to IWE policy. Plaintiff filed a second Charge of Discrimination and retaliation with the IHRC and EEOC in December of 2000. Plaintiff has brought claims for, among other things, sex discrimination, retaliation and disability discrimination.

Discovery has been exchanged by and between the parties, however, the Defendants have refused to provide documents which Plaintiff maintains are critical to the discovery of admissible evidence relevant to her claims. The Responses in issue are attached to the Affidavit of John C. Lynn In Support of Motion to Compel.

LEGAL STANDARDS

Fed.RCiv.P.26 provides that a party may discover any matter that is relevant to any claim, issue or defense that is plead, regardless of which party raises the claim, issue or defense. Evidence need not be admissible to be relevant and thus discoverable (see *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), cert denied, 467 U.S. 1230, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984). Conversely, admissible evidence is almost always discoverable (see *Terwilliger v. York Int'l Corp.*, 176 F.R.D. 214, 218 (W.D. Va. 1997).

Discovery may be limited by the Court's discretionary power if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit. Fed.R.Civ.P. 26(b)(2).

The discovery rules are accorded a broad and liberal treatment to affect their purpose of adequately informing litigants in civil trials. *Hebert v. Lando*, 441 U.S. 153, 176, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Nevertheless, discovery does have ultimate and necessary boundaries, *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947); and it is well established that the scope of discovery is within the sound discretion of the trial court. *Coleman v. American Red Cross*, 23 F.3d 1091, 1096 (6th Cir.1994).

Courts have recognized that, while it is true that relevance in discovery is broader than that required for admissibility at trial, the object of inquiry must have some evidentiary value before an order to compel disclosures of otherwise inadmissible material will issue. *Placenti v. Gen'l Motors Corp.*, 173 F.R.D. 221, 223 (N.D.Ill.1997). Further, the information must be reasonably calculated to lead to the discovery of admissible evidence. Idaho Courts have also recognized that the legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow fishing expeditions in discovery.

The Plaintiff will demonstrate that the discovery sought to be compelled here is focused and specific. The information sought is not only relevant but probably admissible on the ultimate factual issue of whether the Defendant employers have discriminated and/or retaliated against the Plaintiff.

SPECIFIC DISCOVERY ISSUES:

The specific documents requested by Plaintiff in her Motion To Compel are the following. Although the Plaintiff contends that the Defendants have refused to adequately respond to a number of requests, this Motion focuses on only two at this juncture.

(1) Request For Production No. 11

The Request and the Defendants' Response is as follows:

> **Request for Production No. 11:** Please produce for copying and inspection any and all documentation relating to Henry Huber's complaint of inappropriate emails by Randy Hill to the Clines and/or Mr. Elliott in August of 1998, including any investigation thereof and remedial action taken by the Defendants.
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> **Response to Request for Production No. 11:** Defendants object to this request for production, as it is overly broad, burdensome, vague, and ambiguous. Defendants also object on the grounds that some of the information sought is confidential, or of a proprietary nature to the Defendants. In addition, portions of the information requested are

non-discriminatory reasons. Company policy mandated termination due to Plaintiff's long-term disability status. Nevertheless, Mr. Hill had been threatening Plaintiff with termination prior to the diagnosis of breast cancer and will no doubt pursue the assertion that Plaintiff would have been terminated notwithstanding her disability leave, for the alleged, fabricated performance issues pursued by Mr. Hill.

Thus, it is essential, for discovery purposes, for Plaintiff to fully understand how the Defendant employers reacted to the protected disclosures, what information was known by Mr. Hill, what instructions were given to Mr. Hill, and what sanctions, if any, were imposed. The answers to these questions may be contained in the documentation requested and may reveal admissible evidence relative to Mr. Hill's knowledge and intent. A similar request for documentation reflecting the investigation and resolution of protected complaints was granted on a motion to compel in *Sonnino v. University Kansas Hosp. Authority* 220 F.R.D. 633 (D.Kan 2004). The plaintiff there sued for Title VII relief alleging gender discrimination and retaliation. The plaintiff sought and received "all responses by Defendants and other Hospital personnel to those [her] complaints" (Id at p.671, 672).

The Defendants cite the generic objections that the Request is overly broad, burdensome, vague and ambiguous. However, to the contrary, Plaintiff's Request is very specific and limited to the single disclosure by herself and her husband over the emails sent by Hill to Cline and Elliott in August of 1998. The Defendants in their Response to this Request also cite confidentiality or proprietary information as basis for their objection without explaining what privacy or confidentiality interests are at stake. Plaintiff is willing to execute an appropriate confidentiality agreement if there truly exists some confidentiality and/or proprietary and/or privacy interest to deal with.

> protected under the doctrine of attorney-client privilege, is the work product of Defendants' attorney, and/or was prepared in anticipation of litigation. Further, Defendants object to this request for production as it seeks information beyond the permissible scope of discovery. As framed, this request seeks production of documents for individuals who are not named parties to this action. The information sought is not relevant to the causes of action pled in Plaintiff's Complaint and is not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that the request invades the privacy of non-parties and is harassing in nature.

By this Request, Plaintiff seeks all documentation relating to the sexually explicit emails sent by Mr. Hill to the Clines and Mr. Elliott in August of 1998. As alleged in the Complaint both Plaintiff and her husband reported these emails to upper management at IPC. This event is the genesis of Plaintiff's case against the two corporate Defendants for the retaliation by Hill. It is essential for the Plaintiff to know what investigation, if any, was done and what remedial action was undertaken. This event was obviously embarrassing to Mr. Hill who would naturally harbor resentment against the Hubers for disclosing the emails. Plaintiff is entitled to know what Mr. Hill knew about this disclosure.

In a retaliation case such as this, Plaintiff must establish a causal connection between protected activity and any adverse employment action. As a corollary thereto, Plaintiff must establish that the decision maker (Mr. Hill) was aware of the protected disclosure (see *Maarouf v. Walker Mfg. Co., Div. Of Tenneco Automotive, Inc.* 210 F.3d 750, 82 Fair Empl. Prac. Cas. (BNA) 1084 (7th Cir 2000). When Plaintiff establishes a *prima facie* case of retaliation, the Defendant employers carry the burden of offering a non-retaliatory motive for the adverse action. The adverse action consists of shunning, ostracizing, fabricating performance issues and ultimately termination. With respect to the termination, the Defendants maintain that Plaintiff was terminated for legitimate,

Finally, without submitting a privilege log to support the Defendants' contention that the information sought falls within attorney-client privilege or work product, Plaintiff is at a loss as to how these claims can be challenged. The *Sonnino* case above illustrates the general disapproval by federal courts of the practice of asserting the general objection of privilege without submitting a detailed log at the time of objection. In granting the plaintiff's motion to compel, the *Sonnino* court reasoned as follows:

> This Court has on several occasions "disapproved [of] the practice of asserting a general objection 'to the extent' it may apply to particular requests for discovery." This Court has characterized these types of objections as "worthless for anything beyond delay of the discovery." Such objections are considered mere "hypothetical or contingent possibilities," where the objecting party makes "'no meaningful effort to show the application of any such theoretical objection' to any request for discovery." Thus, this Court has deemed such "ostensible" objections waived, or declined to consider them as objections.
>
> (Id at p.665)
> (footnotes omitted)

> The Court finds that the Tenth Circuit's decision in *Peat, Marwick, Mitchell & Co. v. West*, to be on point. There, a request for production was served upon the defendant who attempted to assert claims of privilege through generalized objections. The defendant's response to the request did not identify the documents being withheld under the claimed privilege and no privilege log was provided. The plaintiff filed a motion to compel production of documents in issue. In responding to the motion to compel, the defendant did not identify the privileged documents nor did it provide a privilege log identifying the documents sought in the particular request for production. The court granted the motion to compel, finding that the defendant had failed to meet its burden to establishing its claim of privilege or protection.
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> . . .
>
> Here, the Hospital Defendants served general objections as to attorney-client privilege and work product that were insufficient to preserve the privilege and immunity. When this Court was asked to

rule upon the existence of the privilege and immunity, The Hospital Defendants had not provided the Court with any information upon which it could determine that each element of the attorney-client privilege or work product immunity had been satisfied. It was not until the Hospital Defendants file the instant Motion for Reconsideration that the Hospital Defendants even informed the Court that they provided a belated privilege log which identified some documents responsive to First Request No. 29. But even still, the Hospital Defendants do not provide that log to the Court with their Motion for Reconsideration, and the Court is still unable to determine the applicability of the privilege or work product immunity to any specific documents responsive to this request.

In short, the Hospital Defendants failed to make a timely showing that any documents responsive to this request are protected by the attorney-client privilege or work product doctrine. The Court will therefore deny the Motion for Reconsideration as to First Request No. 29.

(Id at pp. 669, 670)
(Footnotes omitted)

It is frankly hard to imagine that all the documentation sought by this Request falls within any privilege. That said, the Defendants have waived any privilege objection by failing to provide a timely privilege log.

(2) Request For Production No. 18:

This Request and the Defendants' Response is as follows:

Request for Production No. 18: Please produce for copying and inspection any and all documentation relating to the reorganization of Defendant IWE in the fall of 1999 and winter of 2000 and all succession plans submitted.

Response to Request for Production No. 18: Defendants object to this request on the grounds that as framed, it seeks production of documents that are neither relevant to any issue pled in Plaintiff's Complaint nor reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this request for production as it is overly broad, confusing, vague, compound, ambiguous and would place undue burden, hardship and expense on

> Defendants to compile the information sought. Additionally Defendants object as some of the requested information is of a proprietary nature. The request also seeks personal information of persons who are not parties to this lawsuit. It also may contain information protected by privileges, including the attorney/client and/or work product privileges.

As alleged in the Complaint, Mr. Hill undertook an effort to retaliate against Plaintiff shortly after the protected disclosure in August of 1998. This campaign of retaliation continued throughout the remainder of Plaintiff's employment with IWE. As part of this retaliatory campaign, Plaintiff alleges that Mr. Hill created a new position of Director of Engineering Operations and Hydro Compliance and selected Plaintiff's peer to fill this position. This is the only reorganization in issue. Plaintiff also alleges that she was equally or better qualified to fill this position (Complaint para.16). Plaintiff complained to the President of IPC and formed a basis for her first Discrimination Charge (para.55). In Plaintiff's Fifth Cause of Action, she alleges that Hill's failure to appoint her to this new position constitutes a demotion in retaliation over her protected activity and gender discrimination.

Essentially, Plaintiff maintains that this limited reorganization was not legitimate and the documentation sought may lead to admissible evidence as to the legitimacy of this reorganization. The documentation may well show, among other things, the reasons for the reorganization, persons involved, extent of planning, the reasons Plaintiff was not selected and the reasons Plaintiff's subordinate was selected. If this reorganization was the sole doing of Mr. Hill, it is less legitimate and indicative of the retaliation alleged. Likewise, if this reorganization is the product of direction and planning above Mr. Hill, the more legitimate it would appear.

As with the case in the Response to Request No. 11, Defendants assert a host of objections including privileges without a privilege log. The Defendants' blanket claim that the Request is overly broad, confusing, vague, compound, ambiguous with undue burden, hardship and expense etc. is not made in good faith. As mentioned above, IWE is a relatively small organization and the only reorganization in the fall of 1999 and winter of 2000 was the creation of this **one** new position. There is nothing vague, ambiguous or confusing about the focus of this Request.

For the above reasons, the Motion to Compel should be granted.

DATED this 23 day of August, 2004.

LYNN, SCOTT & HACKNEY, P.L.L.C.

BY: _____
JOHN C. LYNN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 23 day of Aug, 2004, I served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

___ U.S. Mail, postage paid
___ Hand delivered
___ Facsimile Transmission

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